

Spring 1990

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### Recommended Citation

Wilkins, William W. Jr and Steer, John R. (1990) "Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines," *South Carolina Law Review*. Vol. 41 : Iss. 3 , Article 3.

Available at: <https://scholarcommons.sc.edu/sclr/vol41/iss3/3>

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# **SOUTH CAROLINA LAW REVIEW**

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VOLUME 41

SPRING 1990

NUMBER 3

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## **RELEVANT CONDUCT: THE CORNERSTONE OF THE FEDERAL SENTENCING GUIDELINES**

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### **I. INTRODUCTION\*\*\***

After more than a decade of deliberation, an overwhelming, bipartisan majority of Congress enacted landmark legislation in 1984 that has revolutionized sentencing in the federal criminal justice system. The Sentencing Reform Act of 1984<sup>1</sup> (Act) created the United States Sentencing Commission to promulgate binding sentencing guidelines for the federal courts.<sup>2</sup> A major goal of the Act was to reduce disparity in sentencing through a new system in which defendants with similar characteristics who committed similar crimes received similar sentences.<sup>3</sup> To accomplish this goal, Congress instructed the Commission to develop a series of sentencing ranges in which the high point of each range did not exceed the low point by more than twenty-five per-

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\*\*\* The views expressed herein are those of the authors and do not necessarily represent the official position of the United States Sentencing Commission.

1. Pub. L. No. 98-473, Title II, 98 Stat. 1987 (1984) (codified at 18 U.S.C. §§ 3551-3559 (1988); 28 U.S.C. §§ 991-998 (Supp. V 1987)).

2. 28 U.S.C. § 994(a) (Supp. V 1987).

3. *Id.* § 991(b)(1)(B).

cent or six months, whichever was greater.<sup>4</sup> Within this range the court could set the sentence.<sup>5</sup> All sentences would be determinative (i.e., without parole). The Commission completed its initial task in April, 1987,<sup>6</sup> and after congressional review, the guidelines became effective for offenses committed after November 1, 1987.<sup>7</sup> Approximately one year of constitutional uncertainty followed, until the United States Supreme Court upheld the Act and the authority of the Commission to promulgate the guidelines.<sup>8</sup> The guidelines are now applied nationwide,<sup>9</sup> and recent data reveal that federal judges complied with the guidelines in approximately 81 percent of the cases.<sup>10</sup>

The guidelines, including amendments,<sup>11</sup> embody a number of critical policy choices within the framework of the Act's extensive guidance and direction. This article focuses on the guideline entitled "Relevant Conduct"<sup>12</sup> which incorporates several significant Commission decisions. This guideline forms the cornerstone of the federal sentencing guideline system, and a thorough understanding of it is essential to correct application of the guidelines.

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4. *Id.* § 994(b)(2).

5. *See id.*

6. *See UNITED STATES SENTENCING COMMISSION, SENTENCING GUIDELINES AND POLICY STATEMENTS* (1987).

7. Pub. L. No. 98-473, *supra* note 1, § 235(a)(1), as amended by Pub. L. No. 99-217, §§ 2, 4, 99 Stat. 1728 (Dec. 26, 1985); Pub. L. No. 99-646, § 35, 100 Stat. 3599 (Nov. 10, 1986); Pub. L. No. 100-182, § 2, 101 Stat. 1266 (Dec. 7, 1987).

8. *See Mistretta v. United States*, 109 S. Ct. 647 (1989) (8-1 decision) (Act did not violate either the nondelegation doctrine or separation of powers principles).

9. According to the Commission's in-house data monitoring system, as of October 1989, approximately 60% of the defendants sentenced were subject to the Sentencing Reform Act and the guidelines. The remainder of the defendants were sentenced under pre-guidelines law because the offenses were committed prior to November 1, 1987.

10. *See UNITED STATES SENTENCING COMMISSION, REPORT ON GUIDELINE SENTENCING AND COMPLIANCE* (January 19, 1989-October 31, 1989) (on file with the Commission); *see also UNITED STATES SENTENCING COMMISSION, ANNUAL REPORT* 36-38 (1988). In the most recent compilation the remaining cases were distributed as follows: 3.4% involved departures above the guideline range; 9.4% involved departures below it; and 5.7% involved defendants who had provided substantial assistance to the government and were thus sentenced below the guideline range.

11. Since promulgation of the initial sentencing guidelines, the Commission has issued amendments on several occasions. On May 1, 1987, the Commission sent to Congress a series of technical and clarifying amendments to take effect on November 1, 1987, with the initial guidelines. In October 1987, the Commission made extensive revisions to the commentary accompanying the initial guidelines. Subsequent amendments were issued effective January 15, 1988 (emergency amendments), June 15, 1988 (emergency amendments), October 15, 1988 (regular amendments), and November 1, 1989 (regular and emergency amendments).

12. UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL § 1B1.3 (Nov. 1989) [hereinafter all references will be to the November 1989 version unless otherwise specified and will employ the abbreviated citation form "U.S.S.G. § XXX.X"].

## II. IMPORTANCE OF THE OFFENSE OF CONVICTION

### A. *The Analytical Basis for the Sentencing Guidelines*

Reflecting one of the fundamental policy decisions underlying the federal sentencing guideline system, application of the guidelines begins with consideration of the offense(s) resulting in conviction.<sup>13</sup> In its deliberations, the Commission debated the merits of a system in which the guideline range would be determined almost entirely from the actual offense behavior.<sup>14</sup> The Commission then considered and sought public comment on a guidelines system in which the offense(s) charged in the indictment would play a much more important role in determining the guideline sentence.<sup>15</sup> The Commission ultimately settled on a system that blends the constraints of the offense of conviction with the reality of the defendant's actual offense conduct in order to gauge the seriousness of that conduct for sentencing purposes.<sup>16</sup>

Under this scheme, determining the guideline sentencing range applicable to a particular defendant begins with the offense of conviction. At the conclusion of the application process, the statutory provisions governing that offense may constrain the sentence otherwise called for by the guidelines.<sup>17</sup> The sentence may not exceed the statutory maximum for the offense of which the defendant was convicted<sup>18</sup> and may

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13. As used in this article and the sentencing guidelines, the term "offense of conviction" generally means a criminal statutory provision that a defendant is convicted of violating. The offense of conviction may or may not coincide with the "real offense," which encompasses the actual criminal conduct associated with the offense of conviction. To illustrate, a defendant's offense of conviction may be a violation of 21 U.S.C. § 843(b) (using a communication facility to arrange a controlled substance offense, commonly known as a "telephone count"), whereas the actual offense conduct may have involved the sale within 1,000 feet of a school (see 21 U.S.C. § 845a) of 1 kilogram of cocaine (see 21 U.S.C. § 841(a)(1)(b)(1)(B)) to a person under the age of 21 (see 21 U.S.C. § 845).

14. UNITED STATES SENTENCING COMMISSION, PRELIMINARY DRAFT SENTENCING GUIDELINES 10-18 (September 1986) [hereinafter PRELIMINARY DRAFT].

15. UNITED STATES SENTENCING COMMISSION, REVISED DRAFT SENTENCING GUIDELINES 3 (January 1987) [hereinafter REVISED DRAFT].

16. For a thorough discussion of this and several other compromises involved in the development of the guidelines, see Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1 (1988).

17. 28 U.S.C. § 994(a) (Supp. V 1987) (Commission to promulgate guidelines and policy statements that are "consistent with all pertinent provisions of [title 28] and title 18, United States Code"). The guidelines must be consistent with the authorized sentences as well as with the applicable statutory maximum and minimum penalties. See *Mistretta v. United States*, 109 S. Ct. 647 (1989); *United States v. Donley*, 878 F.2d 735, 741 (3d Cir.), petition for cert. filed, No. 896108 (U.S. Nov. 13, 1989).

18. U.S.S.G. § 5G1.1(a) (guideline sentence may not exceed statutorily authorized maximum sentence); see *United States v. Lawrence*, 708 F. Supp. 461, 463 (D.P.R. 1989) (guidelines provide that if the sentencing range is greater than the statutory maximum

not be less than any applicable statutory minimum.<sup>19</sup>

To select the appropriate guideline a court must examine the count of conviction described in the indictment. Then, pursuant to sections 1B1.1(a) and 1B1.2(a), that convicted behavior is used to select the offense guideline in Chapter Two of the *Guidelines Manual* (the Offense Conduct chapter) "most applicable to the offense of conviction."<sup>20</sup> To assist judges in selecting the most appropriate Chapter Two guideline, the *Guidelines Manual* includes a Statutory Index.<sup>21</sup> The index, however, is not a guideline.<sup>22</sup> When the decision involves several close alternatives, the standard set forth in section 1B1.2(a) controls.<sup>23</sup>

This "offense of conviction" starting point has substantial practical and policy significance beyond simply setting the maximum penalty exposure. For example, the base offense level, as well as the specific offense characteristics, aggravating or mitigating, that are taken into account in determining the guideline sentencing range come from this starting point.<sup>24</sup> Thus, a conviction for bank larceny differs from that

the latter shall control).

19. U.S.S.G. § 5G1.1(b) (guideline sentence may not be less than any statutorily required minimum sentence); see *United States v. Savage*, 863 F.2d 595, 600 (8th Cir. 1988) (guidelines provide that when the low point of the applicable sentencing range is less than the statutory minimum, that minimum becomes the guideline sentence), *cert. denied*, 109 S. Ct. 2105 (1989).

20. U.S.S.G. § 1B1.2(a).

21. See U.S.S.G. App. A.

22. See U.S.S.G. App. A, intro. comment. (explaining that the same statute may proscribe several offenses, in which case more than one guideline in Chapter Two may be referenced). The commentary further explains that, in an atypical case, the conduct actually described in the indictment count of conviction may more closely match another Chapter Two guideline than the one corresponding to the statutory offense of conviction in the index. *Id.* In such an unusual case, the guideline standard articulated in section 1B1.2(a) again directs that the Chapter Two guideline most applicable to the offense conduct charged in the count of conviction be used. *Id.* The purpose of this rule is to achieve the closest possible fit between the behavior resulting in conviction and the offense conduct guideline in Chapter Two that will be used to measure the seriousness of that offense behavior. *Id.*

23. See, e.g., *United States v. Brunson*, 882 F.2d 151 (5th Cir. 1989). This case provides a good example of the ramifications that the choice of a charge for a particular offense has under the guidelines. Brunson, an assistant district attorney as well as a bank officer and bank attorney, apparently could have been prosecuted for accepting a bribe as a public official. See *id.* at 156. Had Brunson been so charged, the most applicable Chapter Two guideline would have been section 2C1.1. Instead, Brunson was charged and convicted for accepting a bribe as a bank director and attorney. *Id.* The court thus concluded that section "2B4.1 relating to commercial bribery, rather than [section] 2C1.1 relating to bribery of a public official, [was] the most applicable guideline." *Id.* The introductory commentary language in Appendix A that caused the *Brunson* court some difficulty subsequently has been amended effective November 1, 1989. See U.S.S.G. App. A, intro. comment. (hist. n.).

24. As will be explained, the general adjustments in Chapter Three of the *Guide-*

for bank robbery, not just in terms of the statutory maximum,<sup>25</sup> but also with regard to the Chapter Two guideline that will apply at sentencing and the offense conduct that will be taken into account by that guideline,<sup>26</sup> subject to possible further adjustments in Chapter Three.

The Commission's decision to place some emphasis on the offense of conviction gives the prosecutor a *limited* role in shaping the guideline sentencing range. Through plea negotiations, the defense attorney also can have some influence over the guideline sentence. Consequently, some have contended that the sentencing guidelines have shifted sentencing discretion from the court to the attorneys.<sup>27</sup> This contention, however, is based on an incorrect understanding of the operation of the guidelines.

Although comprehensive analysis of the interaction of guidelines and plea negotiation practices is beyond the scope of this Article,<sup>28</sup> such a conclusive characterization is at worst a gross misunderstanding of the manner in which the criminal justice system has operated (both pre- and post-guidelines) and at best an oversimplification and exaggeration. For example, prosecutors have always possessed ultimate authority, subject to constitutional limits, to determine the charge, if any, that will be brought.<sup>29</sup> It naturally follows that such decisions dictate the statutory parameters within which courts have had to make sentencing decisions. Although the sentencing guidelines have not changed

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*lines Manual* are determined under a Relevant Conduct standard and potentially may apply depending on the real offense conduct, regardless of which guideline in Chapter Two is dictated by the conduct in the count of conviction. See *infra* notes 58-64 and accompanying text.

25. Compare 18 U.S.C. § 2113(b) (1988) (maximum sentence of 10 years for nonviolent bank theft) with 18 U.S.C. § 2113(a), (d) (1988) (maximum sentence of 20 years, or 25 years if a dangerous weapon is used, for bank theft involving force and violence).

26. Compare U.S.S.G. § 2B1.1 (base offense level for larceny is 4) with U.S.S.G. § 2B3.1 (base offense level for robbery is 20).

27. See, e.g., *United States v. Roberts*, 726 F. Supp. 1359 (D.D.C. 1989); *United States v. Bethancourt*, 692 F. Supp. 1427 (D.D.C. 1988). In *Bethancourt* and *Roberts* the district judge expressed a number of contradictory frustrations, most of which relate to inherent features of plea bargaining that are largely unaffected by the sentencing guidelines. While on the one hand he decried any shift of discretion to the prosecutor, on the other he criticized the central feature of the guidelines (i.e., Relevant Conduct), which significantly reduces the impact of prosecutorial charge selection and plea bargaining by ensuring that the court will be able to consider the defendant's real offense behavior in imposing a guideline sentence.

28. Acting at the Chairman's appointment, Commissioner Ilene H. Nagel, Professor Stephen Saltzburg (*ex officio* member) and Professor Stephen Schulhofer have initiated a comprehensive study of the impact of plea practices on the operation of sentencing guidelines.

29. See *United States v. Nixon*, 418 U.S. 683, 693 (1974); *United States v. Batchelder*, 442 U.S. 114, 124-25 (1979).

that reality, they have significantly decreased the impact of charge selection and charge bargaining.<sup>30</sup> Also, to the extent the Commission determined feasible, one guideline serves different statutes proscribing essentially the same conduct. For example, numerous statutes deal with larceny, embezzlement and other forms of theft, but all such statutory violations are sentenced under sentencing guideline section 2B1.1.<sup>31</sup>

The sentencing guidelines have not altered the broad authority vested in the courts to scrutinize and reject plea bargains under Rule 11 of the Federal Rules of Criminal Procedure.<sup>32</sup> Advent of the guidelines, however, has placed a greater responsibility on courts to exercise that discretionary authority in a more active, vigilant manner. A strong judicial hand may be necessary in order to guard against possible abuses of prosecutorial discretion or coordinated efforts by defense and government counsel to control the sentence by manipulating conviction counts.<sup>33</sup> In this regard, the presentence report and recommended guideline application of the probation officer play an important role.

In summary, the offense of conviction contributes significantly to guideline sentencing in several ways. First, it ordinarily determines which offense conduct guideline applies. Second, by determining the applicable guideline, it also determines the base offense level, as well as the specific offense characteristics that enhance or reduce the offense level. Third, it sets the maximum and minimum, if any, sentencing limits. Finally, it significantly affects plea negotiations and the ultimate decision by the court whether to accept a plea agreement.

### *B. Transitional Provisions to Real Offense Sentencing*

There is an important but limited exception to the general "starting point" rule for guideline application described above. The exception concerns guilty pleas and is provided for by section 1B1.2(a), which states in part that "in the case of conviction by a plea of guilty or *nolo contendere* containing a stipulation that specifically establishes a more serious offense than the offense of conviction, determine the offense guideline section in Chapter Two most applicable to the stipu-

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30. See *infra* notes 32-33 and accompanying text.

31. See U.S.S.G. § 2B1.1.

32. FED. R. CRIM. P. 11.

33. See, e.g., *United States v. Fitterman*, No. 89 CR 176-1 (N.D. Ill. June 26, 1989). In *Fitterman* the district judge questioned the basis for a recommended charge bargain and motions by both the government and defendant for downward departure from the guideline range. The court ultimately accepted the charge bargain, but rejected the departure motions. *Id.*

lated offense."<sup>34</sup>

The commentary to this guideline describes in detail the operation and rationale for this exception.<sup>35</sup> As indicated in the commentary, this deviation from the general rule is grounded in the legislative history of the Sentencing Reform Act.<sup>36</sup> The House version of sentencing reform legislation<sup>37</sup> generally provided for a strict, offense of conviction sentencing guideline system. Conversely, the Senate version,<sup>38</sup> while it did not expressly specify, seemed to lean toward a real offense system.<sup>39</sup> The House bill included one important exception to its offense of conviction system approach: it would have permitted a court to consider facts outside the offense of conviction "if stipulated as part of a plea agreement. For example, if the defendant pled guilty to theft, but admitted the elements of robbery as part of the agreement, the guideline for robbery could be applied. The sentence, of course, could not exceed the maximum sentence for theft."<sup>40</sup> The Commission adopted this exception to the offense of conviction "starting point" rule because of its sentencing utility and fairness.

The purpose of this exception is to achieve a closer conformity between the charged offense and the real offense conduct in those limited situations in which a defendant admits to conduct that satisfies the elements of a more serious offense than the offense to which he pleads. It is not enough that the defendant simply admit at sentencing to more serious criminal activity than the charged offense proscribes; rather, a negotiated quid pro quo as part of a plea of guilty or nolo contendere is contemplated.<sup>41</sup> In such a case, the Government agrees to forego prosecution of a more serious charge in exchange for gaining application of the guideline applicable to the more serious charge. The defendant agrees to the use of that guideline in exchange for limiting his statutory exposure and, perhaps, avoiding other guideline and statutory consequences.<sup>42</sup> Accordingly, the guideline application procedure in

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34. U.S.S.G. § 1B1.2(a).

35. U.S.S.G. § 1B1.2, comment. (n.1); *see also infra* appendix, at 522-24 (quoting text of comment).

36. *See* U.S.S.G. § 1B1.2, comment. (n.1).

37. H.R. 6012, Sentencing Revision Act of 1984, 98th Cong., 2d Sess., 130 CONG. REC. 20,702.

38. S. 1762, Title II, 98th Cong., 1st Sess., 129 CONG. REC. 22883-917 (1983); S. 668, 98th Cong., 1st Sess., 129 CONG. REC. 3797-814 (1983). S. 668 and S. 1762, Title II, both were entitled "The Sentencing Reform Act of 1983." The bills were ultimately enacted as Pub. L. No. 98-473, Title II, 98 Stat. 1988 (1984).

39. *See* S. REP. NO. 225, 98th Cong., 1st Sess. 37, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3220.

40. H.R. REP. NO. 1017, 98th Cong., 2d Sess. 99 (1984).

41. *United States v. Guerrero*, 863 F.2d 245, 248 (2d Cir. 1988).

42. For example, by negotiating a plea to a less serious offense while stipulating to



special situations has proved to be practically useful.<sup>43</sup>

Thus, to correctly apply the federal sentencing guidelines, a court must first determine the most appropriate offense guideline in Chapter Two of the *Guidelines Manual*. A court ordinarily will focus on the precise offense conduct described in the count of conviction. The court then uses the base offense level of the most applicable guideline, the applicable specific offense characteristics set forth in that guideline, and the applicable general adjustments in Chapter Three to gauge the seriousness of the actual offense conduct. In this process of adjusting the base offense level, the court looks beyond the conviction offense to the actual criminal conduct of the defendant. The parameters of this expanded view, which the sentencing guidelines call "Relevant Conduct,"<sup>44</sup> are potentially much broader than the minimum necessary to satisfy the elements of the convicted offense. Nevertheless, they do not mirror the constitutional outer limits of information that a court may consider for sentencing purposes.<sup>45</sup> Rather, section 1B1.3 assesses the seriousness of the actual conduct of the defendant and his accomplices. This information is ordinarily "relevant" to determining an appropriate sentence, considering the purposes and standards set forth in the Sentencing Reform Act.<sup>46</sup> Additional information outside the bounds

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the conduct described in a more serious offense, a defendant may avoid application of the career offender guideline, *see* U.S.S.G. § 4B1.1, or become statutorily eligible for probation under 18 U.S.C. § 3561(a)(1) (1988) (prohibiting probation for an individual convicted of a Class A or B felony). As the concluding paragraph of Application Note 1 to section 1B1.2 emphasizes, however, the court must determine whether such a plea agreement with stipulation is acceptable. U.S.S.G. § 1B1.2, comment. (n.1).

43. *See* United States v. Garza, 884 F.2d 181, 183-84 (5th Cir. 1989) (outlining how district court should have used section 1B1.2(a) exception in case in which defendant pleaded guilty to two counts of using the telephone to facilitate a narcotics offense and, as part of plea agreement, stipulated to facts establishing a more serious narcotics conspiracy offense); *see also* United States v. Martin, 893 F.2d 73 (5th Cir. 1990); United States v. Strong, 891 F.2d 82 (5th Cir. 1989).

44. *See* U.S.S.G. § 1B1.3.

45. *See, e.g.,* United States v. Tucker, 404 U.S. 443, 446 (1972) ("[B]efore making [the sentencing] determination, a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come."); Williams v. New York, 337 U.S. 241, 247 (1949) (the sentencing court, consistent with the Constitution, should consider "the fullest information possible concerning the defendant's life and characteristics" (footnote omitted)); United States v. Smith, 887 F.2d 104, 108 (6th Cir. 1989) ("[S]entencing judges are not restricted to information that would be admissible at trial. Any information may be considered, so long as it has 'sufficient indicia of reliability to support its probable accuracy.'" (quoting UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL § 6.2 (1987), which is identical to current section 6A1.3(a))); *see also* 18 U.S.C. § 3661 (1988).

46. The factors a court shall consider in imposing a sentence are enumerated in 18 U.S.C. § 3553(a) (1988). Subsection (a)(2) of that section sets out the four purposes of sentencing recognized by the Act: just punishment, deterrence, incapacitation, and reha-

of Relevant Conduct (or within bounds but not adequately taken into account by the applicable offense conduct guideline and pertinent adjustments) may then be considered by the court under section 1B1.4.<sup>47</sup> The court may consider the additional information for two important purposes: determining the appropriate sentence within the applicable guideline ranges,<sup>48</sup> and deciding whether a sentence outside the prescribed range is warranted,<sup>49</sup> and if so, the extent of the departure.<sup>50</sup>

### C. A Composite of Sentencing Information

Although section 1B1.3 is entitled "Relevant Conduct," the alternative parenthetical title—"Factors that Determine the Guideline Range"—perhaps more accurately describes the scope of this section, since the real offense characteristics section of this guideline encompasses more than just offense conduct. This section also includes other factors and information that the offense guidelines of Chapter Two, general adjustment guidelines of Chapter Three, criminal history guidelines of Chapter Four, and sentence determination guidelines of Chapter Five make relevant for constructing the guideline range.<sup>51</sup> For example, subsection (a)(3) of the guideline encompasses harm that was intended by, or that actually resulted from, the offense conduct. Subsection (a)(4), a "catch-all" provision, includes various other types of information that may be relevant in determining appropriate sentencing ranges for particular offenses.<sup>52</sup>

## III. SCOPE OF RELEVANT CONDUCT

The "acts and omissions" of the defendant and those of accomplices for which the defendant is held accountable comprise the most important elements of "Relevant Conduct." In large measure, the guidelines of Chapters Two and Three place a template over these acts

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bilitation. 18 U.S.C. § 3553(a)(2) (1988).

47. Section 1B1.4 essentially incorporates 18 U.S.C. § 3661 (1988). See U.S.S.G. 1B1.4.

48. In a given case, the guidelines may specify three sentencing ranges: (1) a range of imprisonment; (2) a fine range; and (3) a range for a term of supervised release which, pursuant to 18 U.S.C. § 3583(a) (1988), may be imposed to follow a term of imprisonment.

49. See 18 U.S.C. § 3553(b) (1988) (describing the authority and bases for a court to sentence outside the guidelines range (i.e., "depart")).

50. For a thorough discussion of departures and related issues, see Wilkins, *Sentencing Reform and Appellate Review*, 46 WASH. & LEE L. REV. 429 (1989).

51. See U.S.S.G. § 1B1.3.

52. See U.S.S.G. § 1B1.3(a)(3)-(4). For the text of this section, see *infra* appendix, at 526.

and omissions in order to assist the sentencing court in determining the seriousness of the offense.

### A. *The Temporal Dimension of Relevant Conduct*

Analytically, one can consider the acts and omissions of Relevant Conduct in several dimensions, one of which is temporal. A temporal analysis focuses on offense conduct as a moving picture that begins with acts in preparation for the offense and, for some purposes such as assessing whether the defendant obstructed justice or accepted responsibility for his or her conduct, extends to the time of sentencing. Thus, subsection 1B1.3(a)(1) encompasses all acts and omissions for which the defendant is held accountable "that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense . . . ."<sup>53</sup>

Although the actual commission of an offense brings the defendant before the court, the sentence imposed should also reflect conduct both preparatory and subsequent to the offense in order to be consistent with the purposes of sentencing.<sup>54</sup> In fact, in some cases peripheral conduct may have a greater bearing on the guideline sentencing range than the narrower offense of conviction itself.

Advent of the sentencing guidelines has not changed the federal criminal justice system in this respect, since courts customarily have considered this broad range of offense conduct when imposing sentence. Furthermore, the courts appear to have experienced no major difficulty in implementing the concept. For example, evidence of acts prior to a credit card fraud, as well as the conduct involved in the actual commission of the offense, has been adjudicated as a basis for determining an appropriate sentence under the guidelines.<sup>55</sup> Similarly,

53. U.S.S.G. § 1B1.3(a)(1).

54. See 18 U.S.C. § 3553(a)(2) (1988); see also cases cited *supra* note 45 (discussing scope of inquiry with respect to sentencing courts).

55. See *United States v. Roberson*, 872 F.2d 597 (5th Cir.), *cert. denied*, 110 S. Ct. 175 (1989). Technically, the defendant's egregious conduct before and during the offense of conviction in this case was used by the court under section 1B1.4 primarily as a grounds for upward departure from the guideline range, rather than being considered under section 1B1.3 to determine the sentencing range. *Id.* at 602-03. Although the conduct was within the scope of section 1B1.3, the specific guideline applicable to credit card fraud, section 2F1.1, did not address the particular conduct. See U.S.S.G. § 2F1.1. Some of the defendant's conduct, such as exploitation of a vulnerable victim, was an offense characteristic of that guideline under general adjustments in Chapter Three. This typifies the manner in which section 1B1.3 potentially makes relevant a greater range of conduct than the specific offense guideline in Chapter Two, or subsequent adjustments in guideline application, may take into account. The balance of that "uncounted" con-

under section 2D1.1 the guidelines mandate a sentence enhancement for possession of a dangerous weapon in connection with a drug offense.<sup>56</sup> Cases in which this has occurred have included situations in which the weapon was not actually used in the offense, but when it was reasonable to conclude that the weapon was connected with and, therefore, was possessed in furtherance of the offense.<sup>57</sup>

Conduct subsequent to the commission of an offense may affect the guideline sentencing range in a variety of ways. For example, a defendant may receive a two-level enhancement for obstruction under section 3C1.1,<sup>58</sup> or a two-level reduction for acceptance of responsibility under section 3E1.1.<sup>59</sup> Courts have recognized sentence enhancements for obstructive conduct occurring at various stages of the criminal justice process. For example, they have given two-level enhancements for obstructive conduct prior to an arrest,<sup>60</sup> at trial,<sup>61</sup> and after a conviction but prior to sentencing.<sup>62</sup> With respect to determining whether a defendant has accepted responsibility within the meaning of section 3E1.1, the relevant conduct of the defendant<sup>63</sup> may

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duct or information, along with other relevant, reliable information outside the bounds of section 1B1.3, may be considered in determining the appropriate sentence within a guideline range or may warrant departure under the standards of 18 U.S.C. § 3553(b) (1988).

56. See U.S.S.G. § 2D1.1(b)(1). This section provides: "If a dangerous weapon (including a firearm) was possessed during commission of the offense, increase by 2 levels." *Id.* The associated commentary indicates that "[t]he adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." U.S.S.G. § 2D1.1(b)(1), comment. (n.3).

57. See, e.g., *United States v. Hewin*, 877 F.2d 3 (5th Cir. 1989) (enhancement proper for handgun on back seat of auto); *United States v. White*, 875 F.2d 427 (4th Cir. 1989) (enhancement proper for handgun found under front seat of auto); *United States v. Otero*, 868 F.2d 1412 (5th Cir. 1989) (enhancement proper for handgun and ammunition in van); *United States v. Holland*, 884 F.2d 354 (8th Cir. 1989) (enhancement proper for two handguns found during search of defendant's residence), *cert. denied*, 110 S. Ct. 552 (1989). But see *United States v. Vasquez*, 874 F.2d 250 (5th Cir. 1989) (enhancement improper where handgun later found in defendant's apartment several miles from point of cocaine buy).

58. U.S.S.G. § 3C1.1.

59. U.S.S.G. § 3E1.1.

60. *United States v. Franco-Torres*, 869 F.2d 797 (5th Cir. 1989) (firing weapon at officer); *United States v. Galvan-Garcia*, 872 F.2d 638 (5th Cir.) (attempted concealment of marijuana and flight from arresting officers), *cert. denied*, 110 S. Ct. 164 (1989); *United States v. Williams*, 879 F.2d 454 (8th Cir. 1989) (threatening informant).

61. *United States v. Acosta-Cazares*, 878 F.2d 945 (6th Cir.) (perjury at trial), *cert. denied*, 110 S. Ct. 255 (1989).

62. *United States v. Velasquez-Mercado*, 872 F.2d 632 (5th Cir.) (lying to probation officer preparing presentence report, perjury at sentencing hearing, and threatening witness), *cert. denied*, 110 S. Ct. 187 (1989).

63. Relevant Conduct determines not only the base offense level and specific offense characteristics in Chapter Two, but also the adjustments in Chapter Three, including

encompass actions prior to arrest, such as voluntary surrender or voluntary restitution; however, it also must extend to the sentencing proceeding itself.<sup>64</sup>

### B. *The Accomplice Attribution Dimension of Relevant Conduct*

A second dimension of Relevant Conduct is what might be called an "accomplice attribution" dimension. In order to refine and clarify the conduct that the Commission intends to be included within this dimension of Relevant Conduct, the language of both the guideline and the explanatory commentary have been amended on several occasions.<sup>65</sup> Section 1B1.3(a)(1) states that the Relevant Conduct attrib-

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Acceptance of Responsibility. Thus, the term "his criminal conduct" in section 3E1.1(a) should be interpreted to mean the criminal conduct for which the defendant is held accountable under section 1B1.3. This important point was apparently overlooked by the court of appeals in *United States v. Perez-Franco*, 873 F.2d 455 (1st Cir. 1989), in which the court held that a defendant, under section 3E1.1, need only accept responsibility for the conduct identified in the counts to which he pleads guilty. *Id.* at 459. Yet, in that case, the court correctly applied Relevant Conduct to encompass the amount of narcotics included in the distribution counts which were to be dismissed as part of a charge-reduction plea agreement to determine the base offense level. *Id.* at 457-58; *see also infra* text accompanying notes 95-115 (discussing the third dimension of Relevant Conduct embodied in section 1B1.3(a)(2)). While a discussion of the constitutional issues considered by the court is beyond the scope of this article, it is unfortunate that the court did not properly focus on the scope of criminal conduct included in section 3E1.1(a), read in conjunction with section 1B1.3. As a matter of sentencing policy, it is unsound to reward a defendant with a reduced sentence when the defendant does not manifest sincere acceptance of responsibility for all the criminal conduct considered in determining the guideline sentencing range. Furthermore, the Constitution does not require such a skewed result. *Cf. United States v. Gordon*, 895 F.2d 932 (4th Cir. 1990) (differing with *Perez-Franco* and holding that a defendant must accept responsibility for all of his criminal conduct); *United States v. White*, 869 F.2d 822 (5th Cir.) (defendant who pleads "not guilty" but is convicted may find it difficult to persuade the court that he or she accepts responsibility for the criminal conduct), *cert. denied*, 109 S. Ct. 3172 (1989); *United States v. Reed*, 882 F.2d 147 (5th Cir. 1989) (guilty plea alone does not entitle defendant to lighter sentence; defendant must show sincere contrition); *United States v. Belgard*, 694 F. Supp. 1488 (D. Ore. 1988) (sentence reduction for defendants who accept responsibility for their crimes promotes judicial economy and recognizes the greater potential for rehabilitation among criminals who demonstrate true remorse), *aff'd sub nom. United States v. Summers*, 895 F.2d 615 (9th Cir. 1990).

64. *See, e.g., United States v. White*, 875 F.2d 427 (4th Cir. 1989) (primary factors influencing court determination may occur at sentencing hearing; decision not controlled by recommendation in presentence report); *United States v. Ortiz*, 878 F.2d 125 (3d Cir. 1989) (guilty plea does not raise presumption of acceptance; defendant denied reduction because attempted to minimize criminal involvement); *United States v. Scroggins*, 880 F.2d 1204 (11th Cir.) (although defendant cooperated with law enforcement, reduction properly denied on grounds continued cocaine use cast doubt on sincerity of acceptance), *petition for cert. filed*, No. 89-6363 (U.S. Nov. 24, 1989).

65. Section 1B1.3 was first amended effective January 15, 1988, and subsequently,

uted to a defendant includes "all acts and omissions . . . aided and abetted by the defendant, or for which the defendant would be otherwise accountable," that are within the temporal dimension previously described.<sup>66</sup> The "aided and abetted" aspect of this Relevant Conduct definitional phrase is derived from 18 U.S.C. § 2.<sup>67</sup> The concept is well understood and requires little amplification here. The illustrations in the commentary to section 1B1.3 provide several examples of aided and abetted activity for which a defendant should be held accountable.<sup>68</sup> Cases that have applied the guidelines provide further illustrations of how the courts, consistent with the Commission's intent, are interpreting and applying this aspect of Relevant Conduct.<sup>69</sup>

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effective November 1, 1989. U.S.S.G. § 1B1.3, comment. (hist. n.). The January 15, 1988 amendments were an effort to clarify, rather than alter, the intent of the Commission. See *United States v. Fredericks*, No. 89-6009 (10th Cir. Feb. 28, 1990); *United States v. Guerrero*, 863 F.2d 245, 250 (2d Cir. 1988). The amendments effective November 1, 1989 similarly reflect the Commission's purpose of refining and clarifying the original intent, rather than substantively changing the scope of the guideline. See U.S.S.G. § 1B1.3, App. C (amendments 76-78, 303).

66. U.S.S.G. § 1B1.3(a)(1).

67. 18 U.S.C. § 2 (1988). This section provides:

§ 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

*Id.*

68. See U.S.S.G. § 1B1.3 comment. (n.1). Illustrations b and d describe different types of "aided and abetted" activity:

b. Defendant C, the getaway driver in an armed bank robbery in which \$15,000 is taken and a teller is injured, is convicted of the substantive count of bank robbery. Defendant C is accountable for the money taken because he aided and abetted the taking of the money. He is accountable for the injury inflicted because he participated in concerted criminal conduct that he could reasonably foresee might result in the infliction of injury.

. . . .

d. 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. Each defendant is accountable for the entire amount (\$55,000) because each aided and abetted the other in the fraudulent conduct. Alternatively, because Defendants F and G engaged in concerted criminal activity, each is accountable for the entire \$55,000 loss because the conduct of each was in furtherance of the jointly undertaken criminal activity and was reasonably foreseeable.

*Id.*

69. See, e.g., *United States v. Moskowitz*, 888 F.2d 223 (2d Cir. 1989) (defendant instructed co-defendant to "cook" cocaine on aircraft and aided transportation of butane); *United States v. White*, 875 F.2d 427 (4th Cir. 1989) (section 1B1.3(a)(1) includes

The other, more difficult aspect of the "accomplice attribution" dimension involves construction and application of the "otherwise accountable" term in section 1B1.3(a)(1). The Commission defines conduct "for which the defendant would be otherwise accountable" as including the following:

[C]onduct that the defendant counseled, commanded, induced, procured, or willfully caused. (*Cf.* 18 U.S.C. § 2.) In the case of criminal activity undertaken in concert with others, whether or not charged as a conspiracy, the conduct for which the defendant "would be otherwise accountable" also includes conduct of others in furtherance of the execution of the jointly-undertaken criminal activity that was reasonably foreseeable by the defendant. Because a count may be broadly worded and include the conduct of many participants over a substantial period of time, the scope of the jointly-undertaken criminal activity, and hence relevant conduct, is not necessarily the same for every participant. Where it is established that the conduct was neither within the scope of the defendant's agreement, nor was reasonably foreseeable in connection with the criminal activity the defendant agreed to jointly undertake, such conduct is not included in establishing the defendant's offense level under this guideline.<sup>70</sup>

The initial part of this definition incorporates the portion of 18 U.S.C. § 2 providing that a person is legally accountable as an accomplice if the person encourages or solicits criminal conduct "without actually rendering physical aid to the endeavor."<sup>71</sup> This kind of criminal activity frequently applies to the organizer or leader of a criminal scheme. Even if these individuals do not participate in the actual commission of the crime, for purposes of legal accountability and sentencing they ordinarily are sanctioned at least as severely as those who directly participate in the crime.<sup>72</sup>

The remaining portion of the "otherwise accountable" definition in Application Note 1 refers to conspiratorial-type activity within the

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acts of accomplice—weapon possession in connection with drug offense—which are aided and abetted by defendant); *United States v. Fitzwater*, No. 89-3557 (6th Cir. Feb. 16, 1990) (under section 1B1.3(a)(1), defendant who drove getaway car properly received sentencing enhancement for injury to bank teller by accomplice because he aided and abetted robbery); *United States v. Sailes*, 872 F.2d 735 (6th Cir. 1989) (defendant aided and abetted cocaine distribution by providing residence as base of operations for cocaine business).

70. U.S.S.G. § 1B1.3, comment. (n.1).

71. 2 W. LAFAVE & A. SCOTT, *SUBSTANTIVE CRIMINAL LAW* § 6.7, at 137 (1986).

72. Under the guidelines, a defendant who is a manager, leader, organizer or supervisor is subject to a sentencing enhancement of up to four offense levels. U.S.S.G. § 3B1.1. Consequently, the guideline sentence imposed on this type of defendant may be greater than that imposed on one who participates directly in the crime.

realm of what is commonly referred to as the “*Pinkerton*” rule.<sup>73</sup> Two key points should be noted. First, the guidelines specifically employ this doctrine to cover any “criminal activity undertaken in concert with others, *whether or not charged as a conspiracy*.”<sup>74</sup> This similar sentencing treatment for jointly-undertaken activity, regardless of whether there is an actual conviction for the crime of conspiracy, is consistent with the statutory instructions given to the Commission.<sup>75</sup> This policy also supports current views that conspiratorial criminal conduct is ordinarily of the same serious character as the underlying crime that is the object of the conspiracy.<sup>76</sup> Treating concerted activity similarly for sentencing purposes, regardless of how it is charged, is consistent with the “real offense” nature of Relevant Conduct and avoids sentencing disparities that otherwise could result from the exercise of prosecutorial charging discretion. While this objective was intended by the Commission from the outset under its Relevant Conduct guideline, the November 1, 1989 revision of the commentary states the point more clearly.<sup>77</sup> The clarified commentary should further this important sentencing principle and ensure that, in applying Relevant Conduct, courts look beyond the manner in which jointly-undertaken activity is charged in order to assess the seriousness of that conduct.<sup>78</sup>

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73. *Pinkerton v. United States*, 328 U.S. 640 (1946). This decision is regarded as “[t]he leading case for the proposition that membership in a conspiracy is sufficient for criminal liability not only as a conspirator but also for all specified offenses committed in furtherance of the conspiracy. . . .” W. LEFAVE & A. SCOTT, *supra* note 71, § 6.8, at 153.

74. U.S.S.G. § 1B1.3, comment. (n.1) (emphasis added).

75. See 28 U.S.C. § 994(l)(2) (Supp. V 1987). This section instructs the Commission to ensure that the sentencing guidelines reflect the “general inappropriateness of imposing consecutive terms of imprisonment for an offense of conspiring to commit an offense . . . and for an offense that was the sole object of the conspiracy . . . .” While this directive is aimed at the issue of concurrent or consecutive sentencing, it is one indication that, for sentencing purposes, a conspiracy should be punished in a manner similar to the substantive offense that was the object of the conspiracy. See also U.S.S.G. § 1B1.2(d) (“A conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant has been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit.”).

76. See, e.g., *United States v. D’Antoni*, 874 F.2d 1214, 1221 (7th Cir. 1989) (“The proper punishment for conspiracy is a function of the gravity of the crime the defendants conspired to commit. This point, acknowledged both in the new sentencing guidelines . . . and in the second paragraph of [18 U.S.C.] section 371 . . . shows that a five-year ceiling for *all* conspiracies . . . makes no sense.”) (Posner, J., concurring) (emphasis original).

77. See U.S.S.G. § 1B1.3, comment. (n.1) (clearly requiring similar treatment for “criminal activity undertaken in concert with others, *whether or not charged as a conspiracy*”) (emphasis added). Cf. U.S.S.G. App. C, amend. no. 78 (previous version stated: “If the conviction is for conspiracy, it includes conduct in furtherance of the conspiracy that was known to or reasonably foreseeable by the defendant.”).

78. For an example of a case in which an appellate court apparently failed to recog-



A second key point regarding construction of the "otherwise accountable" language in concerted activity situations is that this rule is a *sentencing rule* and not necessarily co-extensive with the *Pinkerton* rule of co-conspirator liability. Thus, in determining the outer limits of the attribution dimension under this aspect of Relevant Conduct, courts should focus on the language in Application Note 1 addressing conduct of others that was "within the scope of the defendant's agreement" or "in furtherance of the execution of the jointly-undertaken criminal activity" or "that was reasonably foreseeable by the defendant . . . in connection with the criminal activity the defendant agreed to jointly undertake."<sup>79</sup> As the note further explains, in a broad conspiracy the relevant conduct considered in constructing the guideline range may not be the same for every defendant in the conspiracy, although each may be equally liable for conviction under *Pinkerton*.<sup>80</sup>

This potential differentiation among co-conspirators is consistent with the multiple purposes of sentencing articulated in the Sentencing Reform Act.<sup>81</sup> The propriety of drawing distinctions among co-conspirators also has been recognized as appropriate for *conviction purposes* by the draftsmen of the revised Federal Criminal Code and the Model Penal Code.<sup>82</sup> In this regard, the authors of the Model Penal Code pointed out that "'law would lose all sense of just proportion' if one might, by virtue of his one crime of conspiracy, be 'held accountable for thousands of additional offenses of which he was completely unaware and which he did not influence at all.'"<sup>83</sup>

Thus, in applying the Relevant Conduct guideline, the Commission intended that courts would, in necessary instances, make differing determinations among co-conspirators. For example, in a narcotics conspiracy, a defendant may be held accountable for a different quantity of drugs than his co-conspirator for sentencing purposes. If the *Pinkerton* rule of conviction liability were strictly mirrored at sentencing, the result might be different. Were that the case,

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nize that Relevant Conduct attribution of sentencing enhancements embodied in a specific offense characteristic does not require a defendant to be convicted of conspiracy, see *United States v. Missick*, 875 F.2d 1294 (7th Cir. 1989).

Without addressing Relevant Conduct, the court held that the sentence of a drug supplier/importer could not be enhanced under section 2D1.1(b)(1) for weapons possessed by two of his distributors because the defendant was not charged in a conspiracy count with weapon possession. *Id.* at 1301-02.

79. U.S.S.G. § 1B1.3, comment. (n.1).

80. See U.S.S.G. § 1B1.3, comment (n.1).

81. See *supra* note 46.

82. 2 W. LAFAVE & A. SCOTT, *supra* note 71, § 6.8, at 155 (quoting MODEL PENAL CODE § 2.06 comment, at 307 (1985)).

83. *Id.* (quoting MODEL PENAL CODE § 2.06 comment, at 307 (1985)).

[e]ach retailer in an extensive narcotics ring could be held accountable as an accomplice to every sale of narcotics made by every other retailer in that vast conspiracy. Such liability might be justified for those who are at the top directing and controlling the entire operation, but it is clearly inappropriate to visit the same results upon the lesser participants in the conspiracy.<sup>84</sup>

Similar considerations of sentencing proportionality motivated the Commission's approach in the Relevant Conduct guideline. While making some differentiation based on the degree of criminal involvement, the Commission believed it entirely appropriate to hold equally accountable under Relevant Conduct those accomplices who, while not at the apex of a criminal organization, were involved to such a degree that the entire scope of the group criminal conduct should be fairly attributed to them. Thus, a court should focus on the language of the commentary that describes conduct "reasonably foreseeable in connection with the criminal activity the defendant agreed to jointly undertake."<sup>85</sup>

The examples in Application Note 1 of the commentary illustrate various situations in which the "reasonably foreseeable" standard under Relevant Conduct either attributes or precludes attribution of criminal activity of others to a particular defendant. These examples indicate that the reasonably foreseeable standard encompasses certain "natural and probable consequence[s]"<sup>86</sup> that flow from the acts of an accomplice in concerted criminal activity,<sup>87</sup> but that accomplice acts not reasonably foreseeable in connection with the criminal activity the defendant agreed to jointly undertake should not be attributed.<sup>88</sup> The

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84. *Id.*

85. U.S.S.G. § 1B1.3, comment. (n.1).

86. 2 W. LAFAVE & A. SCOTT, *supra* note 71, at 157.

87. See U.S.S.G. § 1B1.3, comment. (n.1), illustration (a). The illustration reads:

Defendant A, one of ten off-loaders hired by Defendant B, was convicted of importation of marihuana, as a result of his assistance in off-loading a boat containing a one-ton shipment of marihuana. Regardless of the number of bales of marihuana that he actually unloaded, and notwithstanding any claim on his part that he was neither aware of, nor could reasonably foresee, that the boat contained this quantity of marihuana, Defendant A is held accountable for the entire one-ton quantity of marihuana on the boat because he aided and abetted the unloading, and hence the importation, of the entire shipment.

*Id.*

88. See U.S.S.G. § 1B1.3, comment. (n.1), illustration (c). The illustration reads: c. 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. Defendant E is not accountable for the \$15,000 because the fraudulent scheme to obtain \$15,000 was beyond the scope of, and not reasonably foreseeable in connection with, the criminal activity he jointly undertook with De-

precise contours and outer limits of criminal activity that should be attributed under the Relevant Conduct "reasonably foreseeable" standard must be decided by the courts on a case-by-case basis. The courts should keep in mind the general principles of Relevant Conduct and the purposes of sentencing that provide the foundation for this fundamental guideline.

An issue sure to arise as courts implement the "reasonably foreseeable" standard is whether an objective or subjective standard is intended. In other words, should a court analyze the attributive conduct solely as if an objective, reasonable person were standing in the shoes of the defendant, or should it apply a highly individualized, subjective standard of what the particular defendant, in the circumstances of the particular case, could reasonably foresee? The language of the Relevant Conduct guideline and commentary do not explicitly answer this question. While one might argue that the commentary phrase "reasonably foreseeable by the defendant"<sup>89</sup> suggests a subjective standard, in a somewhat analogous application to a specific circumstance in the Bank Robbery guideline, the Commission has stated more clearly that an objective standard is intended.<sup>90</sup>

Application of an objective standard is more consistent with the guidelines as a whole. This standard is more in keeping with the underlying purpose of the guidelines to achieve greater uniformity in sentencing for similar offense behavior, and generally is more consistent with the Act's multiple purposes of sentencing.<sup>91</sup> Under this approach, the court should attribute conduct of others to the particular defendant being sentenced if objectively a reasonable person could foresee that conduct. Once the guideline range has been determined, however, a court may consider at sentencing any reliable, relevant information.<sup>92</sup> Thus, for determining the appropriate sentence within a guideline range or when weighing the appropriateness of a departure outside the range, a court would not be precluded from considering evidence of a

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fendant D.

*Id.*

89. U.S.S.G. § 1B1.3, comment. (n.1).

90. See U.S.S.G. § 2B3.1(b)(2)(D) (providing enhancement of two offense levels in a robbery if "express threat of death" was made). Application Note 8 of this section explains:

The court should consider that the intent . . . is to provide an increased offense level for cases in which the offender(s) engaged in conduct that would instill in a *reasonable person*, who is a victim of the offense, significantly greater fear than that necessary to constitute an element of the offense of robbery.

U.S.S.G. § 2B3.1(b)(2)(D), comment. (n.8) (emphasis added).

91. See *supra* note 46.

92. See *supra* text accompanying notes 47-50 (discussing U.S.S.G. § 1B1.4).

defendant's mental state,<sup>93</sup> or any other subjective information relevant to the circumstances of the particular case. Subsection (a)(1) of the Relevant Conduct guideline thus encompasses both "temporal" and "attribution" dimensions. Moreover, the two are not mutually exclusive. For example, a defendant may be held accountable for acts of accomplices in preparation for an offense or in an attempt to escape from apprehension after the offense. In other words, the attribution dimension can apply in concerted activity at any stage within the temporal dimension.<sup>94</sup>

### C. *The Third Dimension of Relevant Conduct*

Section 1B1.3(a)(2) contains a third dimension of the Relevant Conduct guideline. This section provides a definitional rule incorporating both dimensions of subsection (a)(1) which, for certain types of offenses, again reaches beyond the count of conviction to encompass additional criminal activity. This part of the guideline includes, "solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all such acts and omissions that were part of the *same course of conduct or common scheme or plan* as the offense of conviction."<sup>95</sup>

In understanding the scope and purpose of this rule, the commentary language in Application Note 2 and the Background Commentary are particularly helpful. Application Note 2 states:

"Such acts and omissions," as used in subsection (a)(2), refers to acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable. This subsection applies to offenses of types for which convictions on multiple counts would be grouped together pursuant to §3D1.2(d); multiple convictions are not required.<sup>96</sup>

The reference to "such acts and omissions" of subsection (a)(2) is an incorporation by reference of the entire scope of conduct, in both "temporal" and "attribution" dimensions discussed above, included within subsection (a)(1). Accordingly, a court must keep in mind this

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93. The guidelines and policy statements recognize that mental state may be a basis for departure in exceptional cases. See U.S.S.G. § 5K2.13, p.s.

94. Section 3E1.1, which pertains to Acceptance of Responsibility, takes into account only the individual acts or omissions of a defendant. See U.S.S.G. § 3E1.1. The absence of an attribution dimension in this guideline is consistent with both the purpose of sentencing adjustments and the fact that it applies to individual defendant conduct subsequent to the completion of an offense.

95. U.S.S.G. § 1B1.3(a)(2) (emphasis added).

96. U.S.S.G. § 1B1.3(a)(2), comment. (n.2).

focal point as it looks at conduct outside the count of conviction that is part of the same course of criminal behavior or scheme as the offense of conviction.

The cross reference to Multiple Count section 3D1.2(d) simply incorporates a list of types of offenses to which this third dimension applies. The reference does not mean that multiple counts of conviction are required in order for subsection (a)(2) to apply. Furthermore, it does not suggest that the occurrence of multiple counts of conviction of a type listed in section 3D1.2(d) limits Relevant Conduct to the criminal activity encompassed in the counts.<sup>97</sup>

The offenses referenced are those of a type for which the quantity of fungible items largely determines the seriousness of the real offense behavior.<sup>98</sup> Thus, drug distribution offenses, thefts, frauds, embezzlements, forgeries, and tax offenses (among others) are offenses to which this third dimension applies, while violent offenses, robberies, and immigration offenses (among others) are not included.<sup>99</sup> The purpose of this distinction is to identify those types of offenses that typically involve "a pattern of misconduct that cannot be broken into discrete, identifiable units that are meaningful for purposes of sentencing."<sup>100</sup> In such cases the "entire range of conduct, regardless of the number of counts that are alleged or on which a conviction is obtained,"<sup>101</sup> is the most appropriate means of assessing the seriousness of the offense behavior.<sup>102</sup> Thus, for offenses involving fungible items, Relevant Con-

97. See U.S.S.G. § 1B1.3, comment. (backg'd.). Thus, the Ninth Circuit's decision in *United States v. Restrepo*, 883 F.2d 781 (9th Cir. 1989), holding that the Multiple Count guidelines in section 3D operate to limit guideline consideration to only the quantity of drugs specified in a two-count conviction, is an erroneous interpretation of the guidelines. *Restrepo* is also contrary to the guideline construction recognized by every court of appeals that has faced similar application issues. See cases cited *infra* note 110. Subsequently, the *Restrepo* opinion was withdrawn and the government's petition for rehearing was granted. See *United States v. Restrepo*, No. 88-3207 (9th Cir. Mar. 2, 1990).

98. See U.S.S.G. § 3D1.2(d) (items primarily include money, property measured by monetary value, or drugs).

99. See U.S.S.G. § 3D1.2(d) (comparing specifically included offenses with specifically excluded offenses).

100. U.S.S.G. § 1B1.3, comment. (backg'd.).

101. *Id.*

102. See *United States v. Scroggins*, 880 F.2d 1204 (11th Cir.), petition for cert. filed, No. 89-6363 (U.S. Nov. 24, 1989). The court explained:

[W]hile the loss occasioned by a series of related thefts is aggregated under the guidelines, the loss resulting from a series of related robberies is not. This result may appear incongruous, but it reflects the guidelines' position that robbery is a violent offense, threatening different persons in each instance. Thus, the guidelines require that each act of robbery be considered a separate offense.

duct of any one count of conviction that is part of a scheme or course of conduct includes all of the conduct (within the scope of subsection (a)(1)) that is part of the scheme or pattern. The Multiple Counts guidelines then operate to ensure that there is no double-counting of the same conduct in those situations in which more than one count of conviction of this type is involved.<sup>103</sup>

The terms “same course of conduct” and “common scheme or plan” used in subsection (a)(2)<sup>104</sup> are not defined in the guideline or commentary. The terms, however, have some analog in Federal Rule of Criminal Procedure 8(a),<sup>105</sup> pertaining to Joinder of Offenses, and pre-guideline case law interpreting its terms. Rule 8(a) permits offenses to be charged in the same indictment if the offenses “are based on . . . two or more acts or transactions connected together or constituting parts of a common scheme or plan.”<sup>106</sup> The case law interpreting this phrase demonstrates that courts focus on the connection between the offenses in terms of time interval, common accomplices, common victims, similar *modus operandi*, or other evidence of a common criminal endeavor involving separate criminal acts.<sup>107</sup> One could reasonably conclude that the Commission intended similar linkage among acts or omissions in its employment of the “common scheme or plan” phrase in subsection (a)(2). Hence, multiple embezzlements over a period of time, or multiple drug deliveries on different occasions would each be considered part of a “common scheme or plan” within the meaning of section 1B1.3(a)(2).

The phrase “same course of conduct,” as used in subsection (a)(2), does not have an exact counterpart in Rule 8(a) of the Federal Rules of Criminal Procedure. The phrase, however, at least encompasses that portion of Rule 8(a) permitting joinder of offenses that “are of the same or similar character” or that involve “two or more acts or transactions connected together.”<sup>108</sup> The guideline term is broader than this analogous language, since it does not require a *connection* between the acts in the form of an overall criminal scheme. Rather, the guideline term contemplates that there be sufficient similarity and temporal proximity to reasonably suggest that repeated instances of criminal be-

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*Id.* at 1212 n.20.

103. See U.S.S.G. § 3D1.1-5.

104. See U.S.S.G. § 1B1.3(a)(2).

105. FED. R. CRIM. P. 8(a).

106. *Id.*

107. See, e.g., *United States v. Sanko*, 787 F.2d 1249 (8th Cir. 1986); *United States v. Valentine*, 706 F.2d 282 (10th Cir. 1983); *United States v. Jordan*, 602 F.2d 171 (8th Cir.), *cert. denied*, 444 U.S. 878 (1979); *cf.*, *United States v. Chinchic*, 655 F.2d 547 (4th Cir. 1981) (interpreting Federal Rule of Criminal Procedure 8(b)).

108. FED. R. CRIM. P. 8(a).

havior constitute a pattern of criminal conduct. For example, if a drug dealer sells heroin to various customers on one day and cocaine to various customers on the next day, his conduct may or may not be part of a "common scheme or plan." There can be little doubt, however, that his conduct is within the "same course of conduct" heading because of the similarity and close temporal proximity of his illegal actions. Similarly, a crime spree of larcenies might not fit the definition of "common scheme or plan," but would be considered part of the "same course of conduct."

In many instances involving multiple criminal acts to which the third dimension of Relevant Conduct applies, either of the two terms could describe the criminal behavior. Thus, there is a substantial overlap in the coverage of these two key terms.

With the exception of the Ninth Circuit, which subsequently has withdrawn its aberrational opinion,<sup>109</sup> the federal courts of appeals have uniformly upheld the application of this third dimension of Relevant Conduct to criminal behavior outside the count of conviction.<sup>110</sup> The courts have recognized that subsection (a)(2) simply formalizes the pre-guidelines practice of considering the full range of a defendant's conduct for sentencing purposes, regardless of whether all of such criminal activity was encompassed within counts of conviction. Thus, as stated by the First Circuit:

Guideline §1B1.3 requires courts to take account of "relevant conduct"—conduct that, very roughly speaking, corresponds to those actions and circumstances that courts typically took into account when sentencing prior to the Guidelines' enactment. Past practice, and authoritative case law, indicate that the Constitution does not, as a general matter, forbid such consideration.<sup>111</sup>

The Eleventh Circuit, in *United States v. Scroggins*,<sup>112</sup> considered

109. See *supra* note 97. In its initial opinion, the *Restrepo* court determined that while no constitutional barrier prevented it from using instances of criminal conduct outside the count(s) of conviction to determine the guideline range, the guideline language itself prevented consideration of such instances. The court reached this result through erroneous construction of the guideline language.

110. See, e.g., *United States v. Wright*, 873 F.2d 437 (1st Cir. 1989); *United States v. Blanco*, 888 F.2d 907 (1st Cir. 1989); *United States v. Paulino*, 873 F.2d 23 (2d Cir. 1989); *United States v. Williams*, 880 F.2d 804 (4th Cir. 1989); *United States v. Taplette*, 872 F.2d 101 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 128 (1989); *United States v. Smith*, 887 F.2d 104 (6th Cir. 1989); *United States v. White*, 888 F.2d 490 (7th Cir. 1989); *United States v. Mann*, 877 F.2d 688 (8th Cir. 1989); *United States v. Wilson*, 884 F.2d 1355 (11th Cir. 1989).

111. *United States v. Wright*, 873 F.2d at 441; *accord*, *United States v. Smith*, 887 F.2d 104 (6th Cir. 1989).

112. 880 F.2d 1204 (11th Cir.), *petition for cert. filed*, No. 89-6363 (U.S. Nov. 24, 1989).

whether application of Relevant Conduct section 1B1.3(a)(2) should include eighteen thefts that did not result in a conviction, in determining the appropriate guideline sentence for one theft that did.<sup>113</sup> The *Scroggins* court, like the *Wright* court, recognized that prior to the advent of the guidelines, judges sentenced on the basis of a defendant's real offense conduct. Accordingly, the criminal conduct embodied in the other thefts related to the seriousness of the count of conviction for sentencing purposes.<sup>114</sup> Thus, the court upheld the inclusion of the other thefts under Relevant Conduct.<sup>115</sup>

The remainder of the Relevant Conduct guideline (i.e., subsections (a)(3), (a)(4), and (b)) is generally more straightforward and limited in application, thus requiring little amplification in this article. "Harm," as described in subsection (a)(3), is broadly defined in Application Note 3 to include any harm that results from the acts or omissions encompassed in subsections (a)(1) or (a)(2).<sup>116</sup> Intended harm is particularly important with regard to inchoate offenses, such as attempts, solicitations and conspiracies.<sup>117</sup> Furthermore, the guidelines consider the creation of a risk of harm for several specific offenses, including a number of environmental offenses.<sup>118</sup> Subsections (a)(4) and (b) simply incorporate by reference into the Relevant Conduct guideline any other conduct or information specified in the applicable guidelines.<sup>119</sup>

#### IV. STANDARD AND BURDEN OF PROOF APPLICABLE TO RELEVANT CONDUCT

Two important issues related to practical application of Relevant

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113. *Id.* at 1211-12.

114. The *Scroggins* court stated:

[I]n assessing the seriousness of that [one theft] offense the guidelines took into account the fact that appellant's offense of conviction was not an isolated event, but rather was the last of a series of offenses. The evidence of these prior thefts eliminates any argument that some concatenation of fortuitous circumstances provoked appellant into committing his offense of conviction on the spur of the moment: appellant's prior thefts establish that he acted purposefully on December 16, having had the opportunity to consider the criminality of his act and its consequences. Such purposeful criminal conduct demands greater punishment, both to reflect society's desire for retribution and to ensure specific deterrence against future criminal conduct by appellant. In aggregating the loss occasioned by all of appellant's thefts, therefore, the guidelines reflect the full magnitude of appellant's culpability.

*Id.* at 1213.

115. *Id.*

116. See U.S.S.G. § 1B1.3, comment. (n.3).

117. See U.S.S.G. § 1B1.3, comment. (n.4).

118. See *id.*

119. See U.S.S.G. § 1B1.3(a)(4), (b).



Conduct principles are (1) the requisite standard of proof for sentencing factors within the bounds of Relevant Conduct, and (2) allocation between the parties of the burden of proof and persuasion for these factors. Neither the Sentencing Reform Act nor the *Guidelines Manual* explicitly address these issues.<sup>120</sup> Nonetheless, examining the guidelines as a whole against the background of past sentencing practices, which served as the anchor point for the initial guidelines,<sup>121</sup> demonstrates that the Commission did not contemplate an offense of conviction, "beyond a reasonable doubt" standard, except in limited instances in which that intent is expressly stated.<sup>122</sup> Similarly, the guidelines provide at least some guidance as to the Commission's thinking on the burden of persuasion issue.<sup>123</sup> In general, however, the promulgated guidelines and policy statements reflect a conscious Commission decision, at least for the present, to leave to the courts responsibility for resolving and further defining these key procedural issues.<sup>124</sup> Thus far, courts have had no difficulty carrying out this task.<sup>125</sup>

Pre-guidelines pronouncements by the United States Supreme Court<sup>126</sup> and other courts<sup>127</sup> indicate that a preponderance of the evidence standard comports with fifth amendment due process requirements when sentencing factors, including those within the ambit of

120. *United States v. Urrego-Linares*, 879 F.2d 1234, 1237 (4th Cir.), *cert. denied*, 110 S. Ct. 346 (1989); *United States v. Guerra*, 888 F.2d 247, 250 (2d Cir. 1989).

121. See U.S.S.G. Chapter One; see also United States Sentencing Commission, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements*, Chapters Three and Four (1987) [hereinafter *Supplementary Report*] (describing in detail the manner in which the Commission analyzed and used past sentencing practice data in developing the initial guidelines).

122. The guidelines spell out those instances in which a conviction standard is to be applied. See, e.g., U.S.S.G. § 1B1.2, comment. (n.5); U.S.S.G. § 2D1.1(a)(1), (a)(2), (b)(2); U.S.S.G. § 2K1.5(b)(1). When the guidelines do not employ language such as "if the defendant is convicted of," it follows that some lesser standard of proof is contemplated. See U.S.S.G. § 1B1.3, comment. (n.5). The Commission's use of past sentencing practices as the starting point for constructing both guideline characteristics and approximate sentence severity suggests that it intended that the standard of proof applicable to guideline sentencing would be essentially the same as under pre-guideline sentencing practice.

123. See, e.g., U.S.S.G. § 3E1.1(a) ("If the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct, reduce the offense level by 2 levels.").

124. *Supplementary Report*, *supra* note 121, at 47; cf. *Preliminary Draft*, *supra* note 14, at 8-9 (Commission proposed a preponderance of the evidence standard of proof and a policy on burden of persuasion).

125. See generally *infra* notes 127-133 and accompanying text (discussion and decisions on standard and burden of proof).

126. See *McMillan v. Pennsylvania*, 477 U.S. 79 (1986).

127. See, e.g., *United States v. Pugliese*, 860 F.2d 25, 28 (2d Cir. 1988), *cert. denied*, 109 S. Ct. 1344 (1989); *United States v. Lee*, 818 F.2d 1052, 1057 (2d Cir.), *cert. denied*, 108 S. Ct. 350 (1987).

Relevant Conduct, are contested. Some lesser standard may be adequate, however, when a factor is uncontested.<sup>128</sup> The guidelines enhance procedural fairness by largely determining the sentence according to specific, identified factors, each of which a defendant has an opportunity to contest, through evidentiary presentation or allocation, at a sentencing hearing. The advent of guideline sentencing thus presents no convincing reason to conclude that constitutional standards are somehow stricter when guidelines are used to assist in fashioning the appropriate sentence, or that policy considerations compel use of a higher standard.<sup>129</sup> Hence, courts should apply the guideline adjustments within the realm of Relevant Conduct when those adjustments are established by the preponderance of the evidence.<sup>130</sup>

Similar constitutional and policy considerations apply with respect to the burden of proof or persuasion. A defendant does not have a constitutional right to a specific sentence<sup>131</sup> or to the lowest possible sentence.<sup>132</sup> Rather, the defendant is "entitled only to have his sentence correctly determined in accordance with the applicable law and based upon reliable evidence."<sup>133</sup> Moreover, the authors of the Sentencing Reform Act specifically rejected an approach that would entitle a defendant to the least severe sentence, adopting instead a framework designed to achieve the most appropriate sentence, with the multiple purposes of sentencing in mind.<sup>134</sup>

For these reasons, once the correct guideline and a base offense

128. See *United States v. Smith*, 887 F.2d 104, 108 (6th Cir. 1989) (guidelines case holding that all drug quantities resulting from defendant's course of conduct, scheme or plan, including those charged in dismissed count, should be considered in determining guideline sentence if supported by "some minimal indicium of reliability beyond mere allegation"); *United States v. Restrepo*, 832 F.2d 146, 149-50 (11th Cir. 1987) (pre-guidelines case holding that government need only produce "some reliable proof").

129. See *United States v. Urrego-Linares*, 879 F.2d 1234, 1237-38 (4th Cir.), *cert. denied*, 110 S. Ct. 346 (1989); *United States v. Guerra*, 888 F.2d 247 (2d Cir. 1989).

130. See *Urrego-Linares*, 879 F.2d at 1238; *Guerra*, 888 F.2d 247; see also *United States v. Wright*, 873 F.2d 437, 441 (1st Cir. 1989); *United States v. McDowell*, 888 F.2d 285 (3d Cir. 1989); *United States v. Casto*, 889 F.2d 562 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 1164 (1990); *United States v. White*, 888 F.2d 490 (7th Cir. 1989); *United States v. Gooden*, 892 F.2d 725 (8th Cir. 1989), *petition for cert. filed*, No. 89-6786 (U.S. Feb. 6, 1990).

131. *Gardner v. Florida*, 430 U.S. 349, 358 (1977).

132. *Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex*, 442 U.S. 1, 7 (1979).

133. *Urrego-Linares*, 879 F.2d at 1239 (citing *Townsend v. Burke*, 334 U.S. 736 (1948)).

134. S. REP. NO. 225, 98th Cong., 1st Sess. 78 (1983) (explaining that the Senate Judiciary Committee had rejected the "lockstep" procedure recommended by the American Bar Association that would have mandated court consideration of sentencing alternatives in increasing order of severity).

level are established,<sup>135</sup> the burden of persuasion as to specific offense characteristics and other offense level adjustments properly should rest with the party asserting their application. Thus, the government generally must carry the burden of persuasion by a preponderance of the evidence to establish aggravating sentencing factors, while the defendant bears the same burden when attempting to show mitigating factors,<sup>136</sup> including the important mitigating adjustment of acceptance of responsibility. It should be recognized, however, that a court may make findings at sentencing based upon any available, reliable information even if *neither* party carries the burden of persuasion as to a particular factor. For example, the court can rely upon information summarized in the presentence report,<sup>137</sup> and it has been held that a defendant has the burden of proffering evidence to demonstrate that the report is inaccurate.<sup>138</sup>

## V. CONCLUSION

The cornerstone of the federal sentencing guidelines, Relevant Conduct, may be analyzed principally in three dimensions: (1) a temporal dimension, focusing on the totality of a defendant's conduct from the planning stages of the offense to the post-offense behavior that bears on the possible guideline adjustments of obstruction and accept-

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135. As explained above, the offense of conviction generally determines which guideline in Chapter Two applies, and the government carries the burden of proof with regard to establishing a defendant's guilt. *In re Winship*, 397 U.S. 358 (1970). If a guideline provides alternative base offense levels, the guidelines and comments provide that the applicable base offense level is determined in the same manner as a determination regarding a specific offense characteristic. See U.S.S.G. § 1B1.2, comment. (n.2); U.S.S.G. § 1B1.3 (using Relevant Conduct principles).

136. *United States v. Kirk*, 894 F.2d 1162 (10th Cir. 1990) (following *Urrego-Linares*, defendant has burden of proving by preponderance of evidence that he was entitled to a reduction under U.S.S.G. § 2K2.1 because the sawed-off shotgun he possessed was a collection item); *United States v. Guerra*, 888 F.2d 247 (2d Cir. 1989) (government has burden of proving drug quantity); *United States v. Wilson*, 884 F.2d 1355, 1356 (11th Cir. 1989) ("The guidelines contemplate that the government has the burden of proving the applicability of sections which would enhance the offense level and the defendant has the burden of proving the applicability of guideline sections which would reduce the offense level."); *United States v. Urrego-Linares*, 879 F.2d 1234 (4th Cir.) (defendant has burden as to acceptance of responsibility), *cert. denied*, 110 S. Ct. 346 (1989); *United States v. Harris*, 882 F.2d 902 (4th Cir. 1989) (defendant seeking reduction of offense level must persuade court of entitlement to such reduction); see also *United States v. Swenka*, 719 F. Supp. 789 (S.D. Iowa 1989) (defendant has burden of showing by preponderance standard that he is entitled to six-level reduction under U.S.S.G. § 2K2.2(b)(3) for obtaining firearm solely for sport, recreation or collection).

137. See, e.g., *United States v. Jackson*, 886 F.2d 838 (7th Cir. 1989).

138. *United States v. Roberson*, No. 89-10049 (9th Cir. Feb. 14, 1990) (WESTLAW, Allfeds).

ance of responsibility; (2) an accomplice attribution dimension, focusing on the conduct of others acting in concert with the defendant and for which the defendant should be held accountable at sentencing; and (3) a third dimension, limited to certain types of offenses such as drugs or monetary value offenses, that incorporates both of the first two dimensions and permits the court to look beyond the actual offense of conviction to the entire range of a defendant's similar offense behavior.

Once the court has determined the offense conduct guideline most applicable to the offense of conviction, it is this composite of the defendant's conduct and related information that essentially determines the appropriate guideline sentencing range. In applying Relevant Conduct precepts and resolving related disputes, courts generally should be governed by a preponderance of the evidence standard of proof—with the burden of persuasion generally resting on the government to establish aggravating factors and on the defendant to establish mitigating ones. The court can then draw upon any other reliable, relevant information to complete the fashioning of an appropriate sentence. The end result, and the objective of the guideline system, is to balance concerns of uniformity (*i.e.*, treating defendants with similar criminal histories who engage in similar offense conduct in a similar manner) with concerns of individual fairness, so that the sentences imposed by federal courts are just and effective.

## APPENDIX

### SELECTED SENTENCING GUIDELINES

#### §1B1.2. Applicable Guidelines

- (a) Determine the offense guideline section in Chapter Two (Offense Conduct) most applicable to the offense of conviction (*i.e.*, the offense conduct charged in the count of the indictment or information of which the defendant was convicted). *Provided*, however, in the case of conviction by a plea of guilty or *nolo contendere* containing a stipulation that specifically establishes a more serious offense than the offense of conviction, determine the offense guideline section in Chapter Two most applicable to the stipulated offense.
- (b) After determining the appropriate offense guideline section pursuant to subsection (a) of this section, determine the applicable guideline range in accordance with §1B1.3 (Relevant Conduct).
- (c) A conviction by a plea of guilty or *nolo contendere* containing a stipulation that specifically establishes the commission of additional offense(s) shall be treated as if the defendant had been convicted of additional count(s) charging those offense(s).
- (d) A conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit.

### Commentary

#### Application Notes:

1. This section provides the basic rules for determining the guidelines applicable to the offense conduct under Chapter Two (Offense Conduct). As a general rule, the court is to use the guideline section from Chapter Two most applicable to the offense of conviction. The Statutory Index (Appendix A) provides a listing to assist in this determination. When a particular statute proscribes only a single type of criminal conduct, the offense of conviction and the conduct proscribed by the statute will coincide, and there will be

only one offense guideline referenced. When a particular statute proscribes a variety of conduct that might constitute the subject of different offense guidelines, the court will determine which guideline section applies based upon the nature of the offense conduct charged in the count of which the defendant was convicted.

However, there is a limited exception to this general rule. Where a stipulation as part of a plea of guilty or *nolo contendere* specifically establishes facts that prove a more serious offense or offenses than the offense or offenses of conviction, the court is to apply the guideline most applicable to the more serious offense or offenses established. The sentence that may be imposed is limited, however, to the maximum authorized by the statute under which the defendant is convicted. See Chapter Five, Part G (Implementing the Total Sentence of Imprisonment). For example, if the defendant pleads guilty to theft, but admits the elements of robbery as part of the plea agreement, the robbery guideline is to be applied. The sentence, however, may not exceed the maximum sentence for theft. See H. Rep. 98-1017, 98th Cong., 2d Sess. 99 (1984).

The exception to the general rule has a practical basis. In cases where the elements of an offense more serious than the offense of conviction are established by the plea, it may unduly complicate the sentencing process if the applicable guideline does not reflect the seriousness of the defendant's actual conduct. Without this exception, the court would be forced to use an artificial guideline and then depart from it to the degree the court found necessary based upon the more serious conduct established by the plea. The probation officer would first be required to calculate the guideline for the offense of conviction. However, this guideline might even contain characteristics that are difficult to establish or not very important in the context of the actual offense conduct. As a simple example, §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft) contains monetary distinctions which are more significant and more detailed than the monetary distinctions in §2B3.1 (Robbery). Then, the probation officer might need to calculate the robbery guideline to assist the court in determining the appropriate degree of departure in a case in which the defendant pled guilty to theft but admitted committing robbery. This cumbersome, artificial procedure is avoided by using the exception rule in guilty or *nolo contendere* plea cases where it is applicable.

As with any plea agreement, the court must first determine that the agreement is acceptable, in accordance with the policies stated in Chapter Six, Part B (Plea Agreements). The limited exception provided here applies only after the court has determined that a

plea, otherwise fitting the exception, is acceptable.

2. Section 1B1.2(b) directs the court, once it has determined the applicable guideline (*i.e.*, the applicable guideline section from Chapter Two) under §1B1.2(a) to determine any applicable specific offense characteristics (under that guideline), and any other applicable sentencing factors pursuant to the relevant conduct definition in §1B1.3. Where there is more than one base offense level within a particular guideline, the determination of the applicable base offense level is treated in the same manner as a determination of a specific offense characteristic. Accordingly, the “relevant conduct” criteria of §1B1.3 are to be used, unless conviction under a specific statute is expressly required.
3. In many instances, it will be appropriate that the court consider the actual conduct of the offender, even when such conduct does not constitute an element of the offense. As described above, this may occur when an offender stipulates certain facts in a plea agreement. It is more typically so when the court considers the applicability of specific offense characteristics within individual guidelines, when it considers various adjustments, and when it considers whether or not to depart from the guidelines for reasons relating to offense conduct. *See* §§1B1.3 (Relevant Conduct) and 1B1.4 (Information to be Used in Imposing Sentence).
4. Subsections (c) and (d) address circumstances in which the provisions of Chapter Three, Part D (Multiple Counts) are to be applied although there may be only one count of conviction. Subsection (c) provides that in the case of a stipulation to the commission of additional offense(s), the guidelines are to be applied as if the defendant had been convicted of an additional count for each of the offenses stipulated. For example, if the defendant is convicted of one count of robbery but, as part of a plea agreement, admits to having committed two additional robberies, the guidelines are to be applied as if the defendant had been convicted of three counts of robbery. Subsection (d) provides that a conviction on a conspiracy count charging conspiracy to commit more than one offense is treated as if the defendant had been convicted of a separate conspiracy count for each offense that he conspired to commit. For example, where a conviction on a single count of conspiracy establishes that the defendant conspired to commit three robberies, the guidelines are to be applied as if the defendant had been convicted on one count of conspiracy to commit the first robbery, one count of conspiracy to commit the second robbery, and one count of conspiracy to commit the third robbery.
5. Particular care must be taken in applying subsection (d) because

there are cases in which the jury's verdict does not establish which offense(s) was the object of the conspiracy. In such cases, subsection (d) should only be applied with respect to an object offense alleged in the conspiracy count if the court, were it sitting as a trier of fact, would convict the defendant of conspiring to commit that object offense. Note, however, if the object offenses specified in the conspiracy count would be grouped together under §3D1.2(d) (e.g., a conspiracy to steal three government checks) it is not necessary to engage in the foregoing analysis, because §1B1.3(a)(2) governs consideration of the defendant's conduct.

*Historical Note:* Effective November 1, 1987. Amended effective January 15, 1988 (see Appendix C, amendment 2); November 1, 1989 (see Appendix C, amendments 73-75 and 303).

### **§1B1.3. Relevant Conduct (Factors that Determine the Guideline Range)**

- (a) *Chapters Two (Offense Conduct) and Three (Adjustments).* Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:
  - (1) all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense;
  - (2) solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction;
  - (3) all harm that resulted from the acts or omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts or omissions; and



- (4) any other information specified in the applicable guideline.
- (b) *Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence).* Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines.

### Commentary

#### Application Notes:

1. Conduct "for which the defendant would be otherwise accountable," as used in subsection (a)(1), includes conduct that the defendant counseled, commanded, induced, procured, or willfully caused. (Cf. 18 U.S.C. § 2.) In the case of criminal activity undertaken in concert with others, whether or not charged as a conspiracy, the conduct for which the defendant "would be otherwise accountable" also includes conduct of others in furtherance of the execution of the jointly-undertaken criminal activity that was reasonably foreseeable by the defendant. Because a count may be broadly worded and include the conduct of many participants over a substantial period of time, the scope of the jointly-undertaken criminal activity, and hence relevant conduct, is not necessarily the same for every participant. Where it is established that the conduct was neither within the scope of the defendant's agreement, nor was reasonably foreseeable in connection with the criminal activity the defendant agreed to jointly undertake, such conduct is not included in establishing the defendant's offense level under this guideline.

In the case of solicitation, misprision, or accessory after the fact, the conduct for which the defendant "would be otherwise accountable" includes all conduct relevant to determining the offense level for the underlying offense that was known, or reasonably should have been known, by the defendant.

#### Illustrations of Conduct for Which the Defendant is Accountable

- a. Defendant A, one of ten off-loaders hired by Defendant B, was convicted of importation of marihuana, as a result of his assistance in off-loading a boat containing a one-ton shipment of marihuana. Regardless of the number of bales of marihuana that he actually unloaded, and notwithstanding any claim on his part that he was

neither aware of, nor could reasonably foresee, that the boat contained this quantity of marihuana, Defendant A is held accountable for the entire one-ton quantity of marihuana on the boat because he aided and abetted the unloading, and hence the importation, of the entire shipment.

b. Defendant C, the getaway driver in an armed bank robbery in which \$15,000 is taken and a teller is injured, is convicted of the substantive count of bank robbery. Defendant C is accountable for the money taken because he aided and abetted the taking of the money. He is accountable for the injury inflicted because he participated in concerted criminal conduct that he could reasonably foresee might result in the infliction of injury.

c. 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. Defendant E is not accountable for the \$15,000 because the fraudulent scheme to obtain \$15,000 was beyond the scope of, and not reasonably foreseeable in connection with, the criminal activity he jointly undertook with Defendant D.

d. 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. Each defendant is accountable for the entire amount (\$55,000) because each aided and abetted the other in the fraudulent conduct. Alternatively, because Defendants F and G engaged in concerted criminal activity, each is accountable for the entire \$55,000 loss because the conduct of each was in furtherance of the jointly undertaken criminal activity and was reasonably foreseeable.

e. Defendants H and I engaged in an ongoing marihuana importation conspiracy in which Defendant J was hired only to help offload a single shipment. Defendants H, I, and J are included in a single count charging conspiracy to import marihuana. For the purposes of determining the offense level under this guideline, Defendant J is accountable for the entire single shipment of marihuana he conspired to help import and any acts or omissions in furtherance of the importation that were reasonably foreseeable. He is not accountable for prior or subsequent shipments of marihuana imported by Defendants H or I if those acts were beyond the scope of, and not reasonably foreseeable in connection with, the criminal activity he agreed to jointly undertake with Defendants H and I

(i.e., the importation of the single shipment of marihuana).

2. "Such acts and omissions," as used in subsection (a)(2), refers to acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable. This subsection applies to offenses of types for which convictions on multiple counts would be grouped together pursuant to §3D1.2(d); multiple convictions are not required.
3. "Harm" includes bodily injury, monetary loss, property damage and any resulting harm.
4. If the offense guideline includes creating a risk or danger of harm as a specific offense characteristic, whether that risk or danger was created is to be considered in determining the offense level. *See, e.g.*, §2K1.4 (Arson); §2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides). If, however, the guideline refers only to harm sustained (*e.g.*, §2A2.2 (Aggravated Assault); §2B3.1 (Robbery)) or to actual, attempted or intended harm (*e.g.*, §2F1.1 (Fraud and Deceit); §2X1.1 (Attempt, Solicitation, or Conspiracy)), the risk created enters into the determination of the offense level only insofar as it is incorporated into the base offense level. Unless clearly indicated by the guidelines, harm that is merely risked is not to be treated as the equivalent of harm that occurred. When not adequately taken into account by the applicable offense guideline, creation of a risk may provide a ground for imposing a sentence above the applicable guideline range. *See generally* §1B1.4 (Information to be Used in Imposing Sentence); §5K2.0 (Grounds for Departure). The extent to which harm that was attempted or intended enters into the determination of the offense level should be determined in accordance with § 2X1.1 (Attempt, Solicitation, or Conspiracy) and the applicable offense guideline.
5. A particular guideline (in the base offense level or in a specific offense characteristic) may expressly direct that a particular factor be applied only if the defendant was convicted of a particular statute. *E.g.*, in §2K2.2, a base offense level of 16 is used "if the defendant is convicted under 18 U.S.C. § 922(o) or 26 U.S.C. § 5861." Unless such an express direction is included, conviction under the statute is not required. Thus, use of a statutory reference to describe a particular set of circumstances does not require a conviction under the referenced statute. Examples of this usage are found in §2K1.3(b)(4) ("if the defendant was a person prohibited from receiving explosives under 18 U.S.C. § 842(i), or if the defendant knowingly distributed explosives to a person prohibited from receiving explosives under 18 U.S.C. § 842(i), increase by 10 levels"); and §2A3.4(a)(2) ("if the offense was committed by the means set

forth in 18 U.S.C. § 2242”).

*Background:* This section prescribes rules for determining the applicable guideline sentencing range, whereas §1B1.4 (Information to be Used in Imposing Sentence) governs the range of information that the court may consider in adjudging sentence once the guideline sentencing range has been determined. Conduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range. The range of information that may be considered at sentencing is broader than the range of information upon which the applicable sentencing range is determined.

Subsection (a) establishes a rule of construction by specifying, in the absence of more explicit instructions in the context of a specific guideline, the range of conduct that is relevant to determining the applicable offense level (except for the determination of the applicable offense guideline, which is governed by §1B1.2(a)). No such rule of construction is necessary with respect to Chapters Four and Five because the guidelines in those Chapters are explicit as to the specific factors to be considered.

Subsection (a)(2) provides for consideration of a broader range of conduct with respect to one class of offenses, primarily certain property, tax, fraud and drug offenses for which the guidelines depend substantially on quantity, than with respect to other offenses such as assault, robbery and burglary. The distinction is made on the basis of §3D1.2(d), which provides for grouping together (*i.e.*, treating as a single count) all counts charging offenses of a type covered by this subsection. However, the applicability of subsection (a)(2) does not depend upon whether multiple counts are alleged. Thus, in an embezzlement case, for example, embezzled funds that may not be specified in any count of conviction are nonetheless included in determining the offense level if they were part of the same course of conduct or part of the same scheme or plan as the count of conviction. Similarly, in a drug distribution case, quantities and types of drugs not specified in the count of conviction are to be included in determining the offense level if they were part of the same course of conduct or part of a common scheme or plan as the count of conviction. On the other hand, in a robbery case in which the defendant robbed two banks, the amount of money taken in one robbery would *not* be taken into account in determining the guideline range for the other robbery, even if both robberies were part of a single course of conduct or the same scheme or plan. (This is true whether the defendant is convicted of one or both robberies.)

Subsections (a)(1) and (a)(2) adopt different rules because offenses of the character dealt with in subsection (a)(2) (*i.e.*, to which §3D1.2(d)

applies) often involve a pattern of misconduct that cannot readily be broken into discrete, identifiable units that are meaningful for purposes of sentencing. For example, a pattern of embezzlement may consist of several acts of taking that cannot separately be identified, even though the overall conduct is clear. In addition, the distinctions that the law makes as to what constitutes separate counts or offenses often turn on technical elements that are not especially meaningful for purposes of sentencing. Thus, in a mail fraud case, the scheme is an element of the offense and each mailing may be the basis for a separate count; in an embezzlement case, each taking may provide a basis for a separate count. Another consideration is that in a pattern of small thefts, for example, it is important to take into account the full range of related conduct. Relying on the entire range of conduct, regardless of the number of counts that are alleged or on which a conviction is obtained, appears to be the most reasonable approach to writing workable guidelines for these offenses. Conversely, when §3D1.2(d) does not apply, so that convictions on multiple counts are considered separately in determining the guideline sentencing range, the guidelines prohibit aggregation of quantities from other counts in order to prevent "double counting" of the conduct and harm from each count of conviction. Continuing offenses present similar practical problems. The reference to §3D1.2(d), which provides for grouping of multiple counts arising out of a continuing offense when the offense guideline takes the continuing nature into account, also prevents double counting.

Subsection (a)(4) requires consideration of any other information specified in the applicable guideline. For example, §2A1.4 (Involuntary Manslaughter) specifies consideration of the defendant's state of mind; §2K1.4 (Arson; Property Damage By Use of Explosives) specifies consideration of the risk of harm created.

This guideline and §1B1.4 clarify the intent underlying §1B1.3 as originally promulgated.

*Historical Note:* Effective November 1, 1987. Amended effective January 15, 1988 (see Appendix C, amendment 3); November 1, 1989 (see Appendix C, amendments 76-78 and 303).

**§1B1.4. Information to be Used in Imposing Sentence (Selecting a Point Within the Guideline Range or Departing from the Guidelines)**

In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law. See 18 U.S.C. § 3661.

### Commentary

*Background:* This section distinguishes between factors that determine the applicable guideline sentencing range (§1B1.3) and information that a court may consider in imposing sentence within that range. The section is based on 18 U.S.C. § 3661, which recodifies 18 U.S.C. § 3577. The recodification of this 1970 statute in 1984 with an effective date of 1987 (99 Stat. 1728), makes it clear that Congress intended that no limitation would be placed on the information that a court may consider in imposing an appropriate sentence under the future guideline sentencing system. A court is not precluded from considering information that the guidelines do not take into account. For example, if the defendant committed two robberies, but as part of a plea negotiation entered a guilty plea to only one, the robbery that was not taken into account by the guidelines would provide a reason for sentencing at the top of the guideline range. In addition, information that does not enter into the determination of the applicable guideline sentencing range may be considered in determining whether and to what extent to depart from the guidelines. Some policy statements do, however, express a Commission policy that certain factors should not be considered for any purpose, or should be considered only for limited purposes. *See, e.g.*, Chapter Five, Part H (Specific Offender Characteristics).

*Historical Note:* Effective November 1, 1987. Amended effective January 15, 1988 (*see* Appendix C, amendment 4); November 1, 1989 (*see* Appendix C, amendment 303).

